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Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1181

RICHARD A. BATTERTON, ET AL.,
Petitioners,

v.

ROBERT FRANCIS, ET AL.,
Respondents.

RICHARD A. BATTERTON, ET AL.,
Petitioners,

v.

BARRY BETHEA, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONERS

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals, which is not reported, is reprinted in the Joint Appendix filed with the petition at Jt.A. 100a. The opinions of the United States District Court for the District of Maryland in the two cases which were consolidated on appeal are reported as *Francis v. Davidson,* 379 F. Supp. 78 (1974) (hereafter *Francis-II)* and *Bethea v. Mason,* 384 F. Supp. 1274 (1974) (hereafter *Bethea)* and are reprinted at Jt.A. 79a and Jt.A. 86a, respectively.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The judgment of the Court of Appeals was entered on September 22, 1975. On November 20, 1975 Mr. Chief Justice Burger ordered that the period for filing a petition for a writ of certiorari be extended to February 19, 1976, and the petition was filed on that latter date. The petition was granted on November 8, 1976.

QUESTION PRESENTED

Whether the regulation of the Secretary of Health, Education, and Welfare ("HEW") which permits the States to exclude from their programs of aid to families with dependent children of unemployed fathers (AFDC-UF) those families in which the father is not working because of his participation in a labor dispute or because of conduct resulting in disqualification for unemployment compensation, violates Section 407(a) of the Social Security Act, 42 U.S.C. 607(a), which directs the Secretary to prescribe standards for State determinations of unemployment in the AFDC-UF program.

STATUTES AND REGULATIONS INVOLVED

The challenged Maryland administrative regulation held invalid below, COMAR 07.02.09.10A(2) (formerly Rule 200.X.A.2), provides as follows:

> A grant may not be paid from GPA-E or AFDC-E:[1]
>
> * * * * * *
>
> 2. To meet need due to being disqualified for unemployment insurance.

The HEW regulation, 45 C.F.R. 233.100(a)(1), also held invalid below, provides in pertinent part:

[1] AFDC-UF is known in Maryland as AFDC-E, for "aid to families with dependent children—employable."

> If a State wishes to provide AFDC for children of unemployed fathers, the State plan under Title IV — Part A of the Social Security Act must . . . [exceptions not relevant here]:
>
> (1) Include a definition of an unemployed father . . . . Such definition must include any father who:
>
> (i) Is employed less than 100 hours a month; or
>
> (ii) Exceeds that standard for a particular month, if his work is intermittent and the excess is of a temporary nature as evidenced by the fact that he was under the 100-hour standard for the prior 2 months and is expected to be under the standard during the next month; except that, at the option of the State, such definition need not include a father whose unemployment results from participation in a labor dispute or who is unemployed by reason of conduct or circumstances which result or would result in disqualification for unemployment compensation under the State's unemployment compensation law.[2]

The above State and Federal regulations were held invalid under Sec. 407(a) of the Social Security Act, 42 U.S.C. 607(a), which provides:

> The term "dependent child" shall, notwithstanding section 606(a) of this title, include a needy child who meets the requirements of section 606(a) (2) of this title, who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father, and who is living with any of the relatives specified in Section 606(a) (1) of this title in a place of residence maintained by one or more of such relatives as his (or their) own home.[3]

[2] The full text of this regulation is reprinted at Jt.A. 124a.

[3] The full text of 42 U.S.C. 607 is reprinted at Jt.A. 34a.

STATEMENT OF THE CASE

A. Proceedings in *Batterton v. Francis*

In this case, petitioners (hereafter "Maryland") are contesting the denial of a motion to vacate an injunction originally entered on March 6, 1972, requiring the State to pay AFDC-UF benefits to the two classes represented by the plaintiffs (hereafter "claimants"), i.e., those fathers disqualified from unemployment insurance because they were engaged in labor disputes, those disqualified because they were discharged for misconduct, and the families of fathers disqualified for either of these reasons.

The two named claimants in the action, Robert Francis and Edward Wright, were residents of Baltimore City who alleged that they had been denied illegally certain welfare benefits for their families and themselves by the Baltimore City Department of Social Services pursuant to Rule 200.X.A.2, quoted above. Said administrative regulation had been promulgated by a predecessor agency to the Social Services Administration of the Maryland State Department of Employment and Social Services (now the Department of Human Resources). Defendants in the action were the then Maryland State Secretary of Employment and Social Services (now Secretary of Human Resources) and the Director of the Social Services Administration. The Secretary of Human Resources acting through the Director of Social Services is charged, *inter alia,* with supervision, coordination, policy- and rule-making authority for public welfare programs within the State, including the AFDC-UF program.

According to the complaint, set out in the Appendix to this brief (App. 6), and the supporting papers, Robert Francis had been employed by American Smelting and Refining Company in its Baltimore plant since October 1, 1951 as a laboratory technician. Mr. Francis was a

member of Local 5877, United Steel Workers of America (AFL-CIO) which had a collective bargaining agreement with his employer. On July 1, 1971, that union and its members, including Mr. Francis, struck the plant and Mr. Francis did not report for work from that date to the filing of the complaint. As alleged, Mr. Francis' employment was the sole source of income for his wife and six children ranging in age from 6 to 13. After going on strike, Mr. Francis had not been able to find other employment. Since he was unemployed because of a work stoppage which resulted from a labor dispute in which he was participating, Mr. Francis was disqualified from receiving unemployment compensation pursuant to Section 6(e) of the Maryland Unemployment Insurance Law (Jt.A. 40a). On July 6, 1971, his family was denied AFDC-UF benefits under Rule 200.X.A.2 because of his disqualification for unemployment insurance (App. 10).

Claimant Edward Wright, who intervened in the action, was discharged on May 12, 1971 from his job as a carpenter by his employer, Wagoner Construction (App. 18). Upon his application for unemployment insurance benefits, it was determined that he was discharged for gross misconduct under Section 6(b) of the Maryland Unemployment Insurance Law (Jt.A. 40a) on the grounds of excessive absenteeism. After the denial of unemployment insurance, Mr. Wright applied for and was denied AFDC-UF benefits for his wife, his 15 year old child, and himself (App. 18).

The original complaint in the action was filed on August 9, 1971 (App. 2). In it claimants requested that Rule 200.X.A.2 be declared illegal and that its enforcement be permanently enjoined. Claimants also sought the convening of a three-judge District Court and certification as a class action on behalf of all other persons similarly situated. The complaint contended that the Maryland regulation violated the Equal

Protection Clause, Section 407 of the Social Security Act, 42 U.S.C. 607, and the HEW regulation promulgated thereunder, 45 C.F.R. 233.100(a) (App. 11).

After the convening of a three-judge panel, the District Court issued an extensive opinion ruling on cross-motions for summary judgment, 340 F. Supp. 351 (1972) (hereafter *Francis-I)* (Jt.A. 2a). In that opinion, the District Court specifically rejected the constitutional claim under *Dandridge v. Williams,* 397 U.S. 471 (1970). Pursuant to its pendent jurisdiction, however, the court held that the Maryland regulation violated the HEW regulation then in effect with regard to claimants and the classes which they represented. Thereafter, on March 6, 1972, the Court enjoined the Maryland regulation as violative of the HEW regulation (Jt.A. 54a). Maryland appealed that injunction to this Court. In an *amicus curiae* memorandum the Solicitor General urged this Court to summarily affirm the lower court ruling on the grounds that the Federal regulation was ambiguous and the Secretary of HEW intended to amend it in order to clarify its meaning (Jt.A. 56a). As to the effect of the proposed revision of the HEW regulation on the Maryland regulation, the Solicitor General stated:

> We are informed that under the proposed provision the regulation will expressly permit the States to vary, within limits, the coverage of their program on the basis of factors other than the number of hours worked. This revision should remove any doubt concerning the validity of Maryland's Rule 200.X.A.2. *Such a regulation is clearly within the authority granted by the basic statute.* (Jt.A. 60a) (Emphasis supplied)

This Court then summarily affirmed the decision below, 409 U.S. 904 (1972) (Jt.A. 61a).

On July 12, 1973, HEW did amend its regulation in the manner indicated, as quoted above, 38 Fed. Reg. 18549 (Jt.A. 124a). Accordingly, Maryland then moved

the three-judge court to dissolve its injunction against the operation of the Maryland regulation pursuant to Federal Rule of Civil Procedure 60(b) (5). In a letter to counsel the three-judge court announced its intention to grant Maryland's motion to dissolve the injunction (Jt.A. 61a-1). However, the claimants then moved for a reconsideration of this intended action, and the District Court granted such request and set the issue for briefs and hearing (App. 4). On June 25, 1974, the District Court denied Maryland's motion to dissolve the injunction, *Francis v. Batterton,* 379 F. Supp. 78 *(Francis-II)* (Jt.A. 79a).

On July 25, 1974, Maryland filed notices of appeal of that decision in this Court and the Court of Appeals. The appeal to the Court of Appeals was designed to protect Maryland's appeal rights if this Court dismissed the appeal for want of jurisdiction. On December 9, 1974, this Court did dismiss the appeal on that basis, 419 U.S. 1042 (Jt.A. 99a). The Court of Appeals then affirmed the *Francis-II* decision in a *per curiam* opinion (Jt.A. 100a), and Maryland filed a petition for a writ of certiorari in this Court.

B. Proceedings In *Batterton v. Bethea*

The *Bethea* case is an action in which another group of persons barred from benefits under Maryland's AFDC-UF program by Rule 200.X.A.2, families with fathers disqualified for unemployment compensation because they voluntarily left work without good cause ("voluntary quits"), also challenged the constitutional, statutory and regulatory validity of the regulation. The Bethea case was filed on August 29, 1973. In the complaint (App. 28) claimant Barry Bethea alleged that about July 3, 1973 he resigned his employment as a truck driver/delivery man for a liquor store after a dispute with the employer concerning payment for stolen bottles. When he applied for unemployment

insurance he was denied benefits because it was determined that he had voluntarily left his employment without good cause under Section 6(a) of the Maryland law (Jt.A 89a, n.8). Thereafter, his application for AFDC-UF payments for his wife, his 10-month old child, and himself was denied because of this disqualification (App. 31).

The claimants in the *Bethea* action asserted essentially the same claims as those in the *Francis* case. The District Court entered an opinion dated November 27, 1974 granting claimant's motion for summary judgment, 384 F. Supp. 1274 *(Bethea)* (Jt.A. 86a). Maryland's appeal of this order to the Court of Appeals was consolidated with the appeal pending in *Francis-II*.

On September 22, 1975, the Court of Appeals by a *per curiam* opinion affirmed both the *Francis-II* and *Bethea* decisions for the reasons stated by the District Court therein, and adopted the District Court opinions as its own (Jt.A. 100a). Maryland then petitioned this Court for a writ of certiorari.

C. Decisions in *Batterton v. Francis* and *Batterton v. Bethea*

In the *Francis-II* decision the District Court first noted that the HEW regulation upon which *Francis-I* was based had been changed in response to that decision (Jt.A. 79a). Next, the District Court considered separately the validity of the new regulation under the statute with regard to the two classes of persons involved in the *Francis* litigation. The court held that persons disqualified for misconduct reasons are still unemployed, i.e. "The statute relates to the unemployment of a father — and a father who is discharged for cause by his employer is unemployed" (Jt.A. 89a). It further stated that until Section 407(a) was amended ". . . no combination of federal and state regulations may provide that a father who is unemployed is not

unemployed." *(Ibid.)* As to those out of work as a result of a labor dispute the District Court stated: "That amendment [to the HEW regulation] established no standards for the State to follow and simply permitted each State to do as it chose" (Jt.A. 84a). Therefore, the court held that amendment was invalid as to both categories of claimants involved in the case and it did not cure the defects in the Maryland regulation.

In the *Bethea* decision the District Court wholly accepted the rationale in *Francis-II* (Jt.A. 96a). The court rejected the State's claim that the *Francis-II* decision was not controlling because of factual difference, i.e. that *Francis-II* involved only those unemployment situations occasioned by misconduct or labor disputes, whereas *Bethea* concerned unemployment resulting from "voluntary quits." The decision held that a father out of work as a result of voluntarily quitting was just as unemployed as a father discharged from his employment for cause (*Ibid.*). The court described the federal regulation as being "incompatible with the federal statute" (*Ibid.*), thus making the Maryland regulation invalid as applied to the claimants and their class in that case.

SUMMARY OF ARGUMENT

This case, which has been before this court on two previous occasions, now presents the issue of the nature and scope of the grant of express rule-making authority to HEW contained in Section 407(a) of the Social Security Act. The courts below did not directly address that question and instead focussed their attention on whether the categories of claimants were, in fact, "unemployed" and whether HEW had established Federal standards under the statute. However, since they declared that the HEW regulation, 45 C.F.R. 233.100(a), violated the statute under these tests, and since it is clear that the Maryland regulation was in

compliance with the HEW regulation, the question before the Court is whether Section 407(a) gave HEW authority to adopt that regulation in its present form. The labor law question, whether the statute bars AFDC-UF payments to strikers, is not before the Court at the present time.

Section 407(a) directs HEW to prescribe standards for State determinations of unemployment in the AFDC-UF program, but does not mandate an exclusive national definition of unemployment. It is true that in some places the legislative history of the 1968 amendments refers to a "federal definition of unemployment" under Section 407(a). However, when all of the legislative history of the statute and the words used in the statute are considered together, it is clear that the Congress did not intend that all families with fathers who might fall within a dictionary definition of the term "unemployment" were to be eligible for benefits. Congress was primarily interested in having HEW establish a reasonable standard, a "middle ground", with regard to the hours worked criterion for determining who was unemployed, which HEW did shortly after the statute was adopted. The legislative history does not show that Congress intended to deny States all discretion with regard to other factors related to the program in connection with eligibility determinations. Furthermore, Section 407(a) constituted a grant of "legislative type" rule-making authority to HEW. Therefore, HEW was given very broad discretion with regard to the type of standards which it could adopt, and courts should avoid substituting their own views and policy preferences for the policy decisions of HEW unless such decisions are clearly arbitrary, unreasonable or beyond the scope of the statute.

As amended by HEW after the *Francis-I* decision, 45 C.F.R. 233.100(a) is a reasonable exercise of the broad rule-making authority granted by Section 407(a). The

denial of benefits to persons disqualified under State unemployment compensation laws is consistent with the statute and Congress' intent that the program not benefit persons who are "voluntarily unemployed." Congress expressed its intent by the amendments to the program adopted in 1968. Attempts at the State level to harmonize the operations and coverage of the AFDC-UF and unemployment compensation programs are proper in light of the similar purposes and coverage of the two programs. Therefore, it is reasonable not to permit persons to receive benefits under the AFDC-UF program for conduct which results in their denial of benefits under the unemployment compensation program. In fact, as the courts below recognized, there is a basis for upholding such a denial of benefits to strikers even if the HEW regulation is deemed improper with regard to a person disqualified from unemployment compensation because of his misconduct or because he voluntarily quit his job.

The decisions below are contrary to the principles developed by this court in recent years concerning State eligibility conditions in the public assistance programs created by the Social Security Act. In effect, the decisions by the courts below constitute a use of a presumption of eligibility with regard to persons who arguably fall within the language of the Social Security Act. This Court expressly rejected that approach in *Burns v. Alcala,* 420 U.S. 575 (1975), and the major AFDC eligibility cases which preceded it. The decisions below also reject the teaching of *New York State Department of Social Services v. Dublino,* 413 U.S. 405 (1973), that State eligibility conditions are to be judged in relation to the purposes of the Social Security Act.

The decisions below also violate this Court's holdings concerning the scope of judicial review of agency rule-making. The analyses in the *Francis-II* and *Bethea* decisions concerning claimants denied benefits because

of misconduct or because they voluntarily quit ignore the statutory language authorizing HEW to prescribe standards and constitute no more than a statement of the lower courts' views as to who is unemployed and who should be covered under the statute. The portion of the *Francis-II* decision dealing with coverage for strikers does not address the question as to why no discretion can be granted to States in this regard and, in effect, compels a federal mandate that all strikers either be eligible for AFDC-UF or be barred from receiving it. That approach is not supported in any way by the language of the statute or the legislative history. By improperly substituting their judgment for that of the Federal agency charged with the enforcement and the interpretation of the statute, the courts below deny to States the discretion granted to them under the Social Security Act, and such action could discourage State participation in the program which is now in operation in only one-half of the States. Since Section 407(a) grants HEW broad authority to prescribe standards and since 45 C.F.R. 233.100(a) (as amended after the *Francis-I* decision) sets reasonable standards consistent with the intent and purposes of the statute, the HEW regulation and the Maryland regulation which complies with it are valid.

ARGUMENT

As indicated, this litigation began in 1971 and has been before this Court on two previous occasions. Despite its lengthy and complicated course, the case now presents a single and relatively clear-cut issue for the Court's resolution. Section 407(a) was amended to its present form in 1968 for the express purpose of creating Federal standards which would govern State determinations of unemployment in the AFDC-UF program. In 1969, pursuant to the grant of rulemaking authority contained in the amended statute, HEW promulgated a regulation, 45 C.F.R. 233.100(a), which

established an hours worked criterion for State definitions of unemployment. The regulation provided that a State plan for the AFDC-UF program had to have a definition of an unemployed father which included:

> . . . any father who was employed less than 30 hours a week, or less than three-fourths of the number of hours considered by the industry to be full time for the job, whichever is less, and . . . which may include any father who is employed less than 35 hours a week or less than the number of hours considered by the industry to be full time for the job whichever is less. (Jt.A. 37a) 34 Fed. Reg. 1146 (Jan. 24, 1969).[4]

Claimants in their complaint in *Francis* attacked Rule 200.X.A.2 on the ground, among others, that it violated the Federal regulation. The three-judge court in the *Francis-I* decision held that the Maryland regulation went beyond the confines of the HEW regulation, which the Court construed as providing an exclusive definition of unemployment in connection with eligibility for the program. After the summary affirmance of *Francis-I* by this Court, HEW did amend its regulation as the Solicitor General had advised this Court it intended to do. The amended regulation expressly authorized the States to bar persons disqualified from unemployment compensation as is done by Maryland Rule 200.X.A.2, 38 Fed. Reg. 18549 (July 12, 1973) (Jt.A. 124a).[5]

By its decisions in *Francis-II* and *Bethea*, the District Court held that the Maryland regulation was still invalid because the statute mandated benefits to persons disqualified because of misconduct or as

[4] This regulation was amended shortly after the filing of the *Francis* action, with the major change being the adoption of a 100 hours-a-month test instead of 30 hours-a-week as in the original version. 36 Fed. Reg. 13604 (July 21, 1971).

[5] HEW stated in the notice of proposed rule making that the amendment was a response to the *Francis-I* decision, 38 Fed. Reg. 49 (January 3, 1973) (Jt.A. 80a, n.3).

"voluntary quits," since they were "unemployed" under the statute. The District Court also held that although persons participating in a labor dispute, *i.e.* strikers, could be considered as not unemployed, the HEW regulation was invalid because it failed to prescribe a uniform "Federal standard." It was not asserted that the Maryland regulation was contrary to the amended version of the Federal regulation. Claimants had conceded that if the amended HEW regulation was valid under the statute, the Maryland regulation was valid and Maryland could deny AFDC-UF benefits to claimants and others in their circumstances.

Therefore, the issue now presented by the decisions below is whether Section 407(a) of the Social Security Act granted HEW sufficient authority to adopt 45 C.F.R. 233.100(a) in its present form. That is true even though, as pointed out by the Solicitor General in his memorandum in support of the petition for certiorari herein, the courts did not directly address that question (S.G. 6). It is also clear that at this stage of the proceedings the issue is not one of "labor law", i.e., whether the Federal scheme governing labor relations prohibits AFDC-UF payments to strikers.[6] That is the contention raised by the intervenor Chamber of Commerce of the United States of America in its petition for a writ of certiorari,[7] but this Court did not act upon the petition.

[6] See 45 U.S.L. Wk. 3336 (November 9, 1976).

[7] No. 75-1182.

I.

SECTION 407(a) GRANTS HEW BROAD AUTHORITY TO PRESCRIBE FEDERAL STANDARDS FOR STATE DETERMINATIONS OF UNEMPLOYMENT WHICH STANDARDS ARE VALID IF THEY ARE REASONABLE UNDER THE STATUTE.

A. Section 407(a) Directs That HEW Prescribe Federal Standards, But Does Not Mandate a Uniform National Definition of Unemployment.

The key issue in this case is the construction to be given to the words contained in Section 407(a) ". . . unemployment (as determined in accordance with standards prescribed by the Secretary) . . . ." The determination of "unemployment" of a father is critical in the operation of the program because the finding of "deprivation", and thus eligibility for AFDC benefits, depends upon it, Section 406(a) of the Social Security Act, 42 U.S.C. 606(a). The claimants contended the HEW regulation was invalid not only because it allowed the States to exclude certain persons who were "unemployed" under the statutory term, but also because it improperly granted discretion to the States. In other words, claimants asserted that the statutory language mandated the adoption of an exclusive national definition of unemployment for all States wishing to enter the program and that definition was to be in accord with the ordinary dictionary meaning of the term "unemployment". In support of this contention claimants rely heavily upon selected legislative history of Section 407(a). However, the legislative history and the language of the provision do not support that contention, but, only that the statute means what it says — that HEW was to adopt *Federal standards* for *State determinations* of unemployment.[8]

[8] Much of the pertinent legislative history is set forth in Appendix D to the *Francis-I* decision (Jt.A. 42a). Additional excerpts are included in the Appendix to this brief (App. 37).

The Congress first amended the Social Security Act in 1961 to authorize AFDC payments to families in which the need arose as a result of unemployment, P.L. 87-31, 75 Stat. 75. At that time Section 407 authorized AFDC for families deprived of support "by reason of the unemployment (as defined by the State) of a parent. . . ." *Ibid.* That language, however, was amended in 1968 to its present form, as quoted above, P.L. 90-248, 81 Stat. 882. Under the statute as it existed prior to 1968, the States were left with discretion as to the number of parents eligible for assistance, the required connection of the parents with the work force, whether the assistance was a supplement to or a substitute for those eligible for unemployment compensation, and how many hours worked a month constituted employment. As the Under Secretary of HEW, Wilbur Cohen, reported to the Congress, "the difference between the State programs" under the statute was great. States were defining unemployment "as narrowly or broadly" as they wished, "requiring substantial previous work experience or no work experience." Thus in some States, many families were qualifying for assistance while in adjacent States very few were meeting the State definitions, Statement by Wilbur J. Cohen on H.R. 12080 before the Senate Committee, on Finance, Hearing on Social Security Amendments of 1967, Part I, page 268, August 23, 1967 (App. 39).

In order to correct these inequities, Congress amended Section 407, resolving the number of parents problem by substituting the word "father" for "parent", resolving the question of connection with the work force by requiring a father to meet certain tests of prior attachment to the work force in order to be eligible for assistance, and at least partially resolving the question of the relationship of eligibility for AFDC-UF benefits and unemployment compensation by prohibiting AFDC assistance if a father was receiving unemployment compensation. See *Philbrook v. Glodgett,* 421

U.S. 707 (1975). With regard to the key problem of too broad or narrow State definitions, the Congress deleted the reference to the definitional power of the States and substituted instead the present language directing HEW to prescribe standards for the State determinations of unemployment.

The Report of the House Ways and Means Committee gave the following explanation of that last change:

> A major characteristic of the law is the authority left to the States to define "unemployment." Your Committee believes that this has worked to the detriment of the program because of the wide variation in the definitions by the States. In some instances, the definitions have been very narrow so that only a few people have been helped. In other States, the definitions have gone beyond any thing that the Congress originally envisioned. Your Committee's bill is designed to correct this situation and to make other improvements in the program.
>
> The overall objective of the amendments proposed by the Committee is to authorize a Federal definition of unemployment by the Secretary (but within certain limits set forth in legislation) . . . . H.R. Rep. 544, 90th Cong. 1st Sess. pp. 107-8 (1967). (Jt.A. 46a)

Claimants have pointed to several references throughout the legislative history of the 1968 amendments to a "uniform definition" or "Federal definition" of unemployment, e.g., S.Rep., No. 744, 90th Cong., 1st Sess., p. 160 (App. 37); Committee Print, Brief Summary of Major Provisions and Detailed Comparison with Prior Law, the Social Security Amendments of 1967 — Public Law 90-248, 90th Congress, U.S. Senate Committee on Finance, p. 3 (July 25, 1968) (App. 38); Statement by Wilbur J. Cohen, *supra* (App. 39). On the other hand different portions of the legislative history accurately describe the authority and responsibility given to HEW in terms closer to the statutory language:

"The amendments also provide that the Secretary will prescribe standards for the determination of what constitutes unemployment." Joint Committee Print, Summary of Social Security Amendments of 1967, U.S. Senate Committee on Finance and House Committee on Ways and Means at 17 (December 1967) (App. 39); 113 Cong. Rec. Pp. 36373-4 (Dec. 13, 1967) (an explanation of Conference Committee report on Social Security Amendments of 1967 of Representative Mills) (App. 38). Maryland concedes that the various documents which make up the legislative history behind Section 407(a) are less than crystal clear as to whether the Congress was making a general grant of legislative type of rule-making authority to HEW or whether it was mandating that the agency adopt a single national definition for the term unemployment. An example of that cloudiness is H.R. Rep. No. 544 which accompanied the original bill as it was recommended to the House of Representatives by the Ways and Means Committee. That report at page 17 first describes the change in 407(a) as providing that the "definition of unemployment would be made by the Federal Government" (which reference is quoted in *Francis-II* (Jt.A. 85(a)) (App. 39); it then states at page 108 that the bill's language would "authorize a Federal definition of unemployment by the Secretary", as quoted above (App. 39); and finally, in the section-by-section analysis at page 175, the report uses the actual words in the statute to describe its effect (App. 40).

Thus, many reports and the long hours of debate on the 1968 amendments produced different phraseologies as to the exact intent of the change in 407(a). For that reason these materials cannot be interpreted in a vacuum, but must be considered in connection with the actual words used in the statute. Less thought is given to the future effect of committee reports and floor statements than to choosing the words of the statute, Cox, *Judge Learned Hand And the Interpretation of Statutes*, 60 Harv. L. Rev. 370, 381 (1947). This Court

itself has long held that the most persuasive evidence for the purpose of the statute is the "words by which the legislature undertook to give expression to its wishes." *Perry v. Commerce Loan Company,* 383 U.S. 392, 400 (1966) quoting *United States v. American Trucking Association,* 310 U.S. 534, 543 (1940). Thus, the references by claimants to various Committee Reports, and statements of Congressmen and others for support of their position must be tempered by the particular words used by the Congress, i.e. "as determined in accordance with the standards prescribed by the Secretary."

The most significant fact in interpreting this legislative history is that Congress chose not to merely substitute the word "Secretary" for the word "State" as it existed in the statute adopted in 1961. That obviously would have been the easiest and clearest way to mandate HEW to promulgate an exclusive Federal definition as claimants maintain was intended. Instead, Congress chose to rewrite the phrase entirely and to delete the reference to a definition. It must be concluded that Congress intended each and every word, and that all are necessary to express the Congressional intent, *e.g. Richards v. U.S.,* 369 U.S. 1, 11 (1962); *McDonald v. Thompson,* 305 U.S. 263, 266 (1938). The District Court, itself, in *Francis-I* noted the significance of this change in wording. In describing that change, the court stated:

> . . . When Congress removed the parenthetical words "as defined by the State," and substituted the words "as determined in accordance with standards prescribed by the Secretary" Congress did not simply substitute "as determined by the Secretary." Thus, Congress used words which did not mandatorily require the Secretary to require each state to adopt the same meaning of the word "employment" but instead merely *authorized* the Secretary to prescribe a national meaning if the Secretary so desired. 340 F. Supp. at 367 (emphasis in original) (Jt.A. 26a).

This language accurately sums up the intent and meaning of Section 407(a), as amended, when the legislative history and the words of the statute are considered together.

B. The Regulation Which HEW Adopted Pursuant to the Grant of Broad Rule-Making Authority in Section 407(a) Should not be Held Invalid Unless it is Arbitrary and Beyond the Scope of Statutory Authority.

Section 407(a) clearly grants HEW "legislative-type" rule-making authority, See Davis, *Administrative Law Treatise,* Sections 5.03-5.04 (1957 edition) 1970 supplement and *Administrative Law Of The Seventies* (1976). Such rule-making involves the establishment of statutelike standards pursuant to a delegation of authority by the legislature, *ibid.; e.g. American Telephone & Telegraph Co. v. United States,* 299 U.S. 232, 236-7 (1936). This Court has recognized that some rules fall in this category, *Morton v. Ruiz,* 415 U.S. 199, 236, (1974); *Charles Ilfeld Co. v. Hernandez,* 292 U.S. 62, 65 (1934). The significance of a legislative-type rule is that it is to be treated as valid and binding if it is within the granted power and not unreasonable or arbitrary, *Davis, supra; American Telephone and Telegraph Company v. United States, supra* at 236-7, (1936); *Citizens To Preserve Overton Park v. Volpe,* 401 U.S. 402, 416 (1971). See Wright, *The Courts and The Rulemaking Process: The Limits of Judicial Review,* 59 Cornell L. Rev. 375 (1974). Thus, there is a "presumption of regularity" or validity which attaches to a regulation such as 233.100(a) unless it can be shown that HEW acted in a manner not authorized or contemplated, or unreasonable, under the statute.

This presumption of validity of a legislative-type of regulation appears to derive from the established principles of administrative law, that courts should

avoid substituting their own views for the policy decisions of agencies charged with the administration of programs, and that even greater deference is in order in construing regulations of such agencies, e.g. *Bowles v. Seminole Rock Co.,* 325 U.S. 410, 413-14 (1945); *Udall v. Tallman,* 380 U.S. 1, 16-18 (1965). This Court has recently held that this respect for the construction of a statute by the agency charged with enforcing it also applies to HEW and the State agencies in connection with the interpretation and application of the Social Security Act:

> In interpreting this statute, we must be mindful that "the construction of a statute by those charged with its execution shall be followed unless there are compelling indications that it is wrong. . . ." (citations omitted) *New York State Department of Social Services v. Dublino,* 413 U.S. 405, 421 (1973).

Section 407(a) clearly grants such a legislative type of rulemaking authority to HEW. The distinguishing factor of such authority is delegation by the legislature to the agency to prescribe such rules. Section 407(a) certainly embodies such a delegation. The statute in its original form expressly granted very broad definitional powers to the States and the 1968 amendment did not restrict that delegation but instead transferred some of the authority embodied therein to the Federal agency as well as to the States. Claimants have not contended that the 1968 amendment cut back on this grant of rulemaking power. All of their arguments in this regard go to the question of whether there was to be an exclusive Federal definition as opposed to a prescription of standards by HEW. The District Court has not directly addressed the question of the scope of HEW's authority in this regard, but instead has ". . . substituted its judgment for that of the agency." *Citizens To Preserve Overton Park v. Volpe, supra* at 416. In fact, there are no "compelling indications" that 45 C.F.R. 233.100(a) goes beyond the statute, since it accomplishes the intent

of the statute and grants only limited discretion to the States which is reasonable under the statute.

II.

45 C.F.R. 233.100(a) PRESCRIBES REASONABLE STANDARDS FOR STATE DETERMINATIONS OF UNEMPLOYMENT UNDER SECTION 407(a).

Since 407(a) did not mandate an exclusive national definition of unemployment, in considering the validity of 45 C.F.R. 233.100(a) this Court must consider the specific standards embodied in the regulation to determine whether they are reasonable or consistent with the provisions of the statute. As indicated, they must be upheld if they are reasonable, even if the Court might choose more broad or more narrow standards if it were required to fashion its own definition of unemployment. As this Court has recognized, the AFDC-UF program is a "scheme of cooperative federalism", *King v. Smith,* 392 U.S. 309, 316 (1968), which must deal with the problems of increasing financial dependence and mounting welfare costs, *New York State Dept. of Social Services v. Dublino, supra* at 413-14. Because of the severity of these problems:

> . . . state governments, in cooperation with the Federal Government, must be allowed considerable latitude in attempting their resolution. *Ibid.*

Therefore, complete uniformity of implementation is not a basic goal of the program and the Secretary's regulation is not invalid merely because it leaves some measure of discretion to the States.

A. The Hourly Test for Unemployment Contained in 45 C.F.R. 233.100 Fulfilled the Statutory Intent to Bring About More Uniformity in the AFDC-UF Program in the Various States.

In determining whether 45 C.F.R. 233.100(a) is in accord with the Section 407(a), one must look at all

features of the regulation to determine whether, in fact, it does prescribe reasonable standards for the States. In its original form in 1969 and after its amendment in 1973, the regulation has always included an hours worked test for determining unemployment.[9] In its present form that test provides that a State shall include in its definition of an unemployed father a father who generally works less than 100 hours per month.[10] As the legislative history of 407(a) indicates, the major purpose of the grant of rulemaking authority to HEW was to achieve more uniformity among States' definitions of unemployment. The major discrepancies existed in the amounts of part-time work which would bar coverage in the different states. For that reason HEW had always taken the position that the primary function of the regulation under 407(a) was to establish a reasonable hours-worked criterion for the determination of unemployment.

The other major case involving the validity of this particular regulation, *Macias v. Finch,* 324 F. Supp. 1252 (N.D. Calif. 1970), affd. *sub nom. Macias v. Richardson,* 400 U.S. 913 (1970), confirms this view of the purpose of the regulation. *Macias* involved a challenge to both the legality and constitutionality of the California AFDC-UF program adopted pursuant to the original version of 45 C.F.R. 233.100(a). In discussing the statutory basis of the regulation, the District Court noted that the memorandum submitted by HEW in support of its motion to dismiss described the wide

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[9] See p. 13 and notes 4 and 5, *supra.*

[10] Jt.A. 124a. The present regulation contains no provision prohibiting States from including persons who worked more than 100 hours per week from coverage under the program. These hourly tests permit a finding of "deprivation", but a family still must meet a needs test for receipt of AFDC benefits, Section 402(a) (8), 42 U.S.C. 602(a) (8).

variations among the States as to the hours worked tests used in determining unemployment prior to the 1968 amendment. The court stated that these variations were the reason for the amendment to 407(a), and held, therefore, that the Federal regulation complied with the Congressional intent and was consistent with Section 407(a), 324 F. Supp. at 1256-57.

B. The Limited Grant Of Discretion To The States Contained In 45 C.F.R. 233.100(a) Is Reasonable Under The Statute.

1. *The denial of benefits to persons disqualified from unemployment compensation.*

The legislative history of Section 407, the terms of the statute itself, and the nature of the operations of the AFDC-UF establish that eligibility restrictions related to the operation of State unemployment compensation programs are fully consistent with the purposes of the statute. The authors of Section 407 were primarily interested in establishing a program which would help those persons who were involuntarily unemployed. The program was also intended to provide coverage to needy unemployed persons who had exhausted their coverage under the unemployment compensation program. Clearly it was not intended to benefit unemployed persons whose unemployment resulted from their own conduct. In his message proposing legislation, President Kennedy stated:

> Under the Aid to Dependent Children program, needy children are eligible for assistance if their fathers are deceased, disabled or family deserted. In logic and humanity, a child should also be eligible for assistance if his father is a needy unemployed worker — for example, a person who has exhausted unemployment benefits and is not receiving adequate local assistance . . . President's Message to Congress on Program for Economic Growth and Recovery, U.S. Code Cong. and Admin. News, 87th Cong. 1st Sess. 1032.

The bill as introduced was substantially modified by the Ways and Means Committee of the House of Representatives. Many of these changes were directly related to ensuring that the program would provide assistance only to families of the involuntarily unemployed. Thus, when the bill was being considered by the House for passage, Representative Byrnes, a co-sponsor of the bill and the ranking minority member of the Committee, stated:

> What the legislation does is to add the new category which says that if the breadwinner is able to work and if he is involuntarily unemployed and no work is available we will treat that family in the same manner we treat the family when the breadwinner is dead, absent or incapacitated. I recognize and I think the committee recognizes, that as we move into this category of involuntarily unemployed people, we do have an additional problem, namely the determination of whether it is really involuntary unemployment. In the case of disabled breadwinner you can test that reality. In the case of his absence from the home, you can test that and determine whether for a fact that situation exists. The death of the breadwinner is a certainty. But here we do get the problem of determining whether, in fact, this breadwinner is involuntarily unemployed and I put the emphasis on the word "involuntary."
>
> If you will look at the Bill on page two, you will find the additions made by the Committee to assure that aid would go only to children of the involuntarily unemployed beginning at line nine, page two and going through to page three. That was added by the Committee to try to assure that we will not be giving this relief to people who in a sense may be more or less voluntarily unemployed and who are refusing work. I think it appropriate that this legislation is enacted on a temporary basis so that we can see how it is administered by the States and those in charge of the program with respect to the determination of whether or not the people who receive this aid or the families who

receive this aid are in a situation where the breadwinner is truly in fact involuntarily unemployed. . . . 107 Cong. Rec. 3767 (March 10, 1961).

Claimants have attempted to explain away this statement by Congressman Byrnes asserting that all that was meant by being "involuntarily unemployed" was a refusal of a bona fide job offer after becoming unemployed. If that were the case, Congressman Byrnes would not have explicitly stated that the AFDC legislation is designed to extend aid only if the breadwinner is "able to work" *and* "involuntarily unemployed." It seems clear that the Congressman used both factors as reasons for disqualifying a former wage earner and his family from AFDC-UF assistance. Nor did any member of the Senate voice views inconsistent with this philosophy. Indeed, the Senate specifically amended the house bill to give States the option to deny assistance to families in which the unemployed parent was receiving unemployment compensation. These statements and actions of the Congress at the time the program was first created show its intent not to extend assistance to the voluntarily unemployed and thereby conflict with the already well established unemployment compensation programs in effect in all the States.

The subsequent amendments to the program illustrate a Congressional desire to tie the AFDC-UF program even more closely to the operations and purposes of the unemployment compensation program. The 1968 amendments made many changes in the program which closely tied it to the unemployment compensation programs operating in all the States. These changes included the disqualification of fathers receiving unemployment compensation (42 U.S.C. 607(b) (2) (C) (ii)); the requirement that a father be currently registered with the State Employment Office, which is also a requirement of unemployment compensation (42 U.S.C. 607(b) (2) (C) (i)); and the establishment of a connection with the work force by the receipt of unemployment compensation or a showing that compensation would be paid if the father were in "covered" employment (42 U.S.C. 607(b) (1) (C) (ii) and (d) (3) (A) and (B)). These changes indicate a strong Congressional desire to supplement the coverage of existing unemployment compensation programs but not to duplicate or subvert those programs in any way. This Court pointed out the purpose of the unemployment compensation program in its decision in *California Department of Human Resources Development v. Java,* 402 U.S. 121 (1971), when it stated: "The objective of Congress was to provide a substitute for wages lost during the period of unemployment not the fault of the employee." *Ibid.* at 130. The statement of President Kennedy proposing the AFDC-UF program expressly indicates the same goal of assisting workers whose unemployment and need are not the result of their own conduct.

In addition to the general coextensiveness of the purposes of the AFDC-UF and unemployment compensation programs, the unemployment compensation disqualifications specifically are consistent with the goals of the AFDC-UF program. Commentators indicate that the disqualifications have three main objectives: (1) the furtherance of the primary purpose of the program to assist only those who are unemployed involuntarily; (2) the limiting of the risks to employers by eliminating certain events over which they could exert little control; and (3) the deterence of the type of conduct which leads to the severance of employment relationships and to disqualification.[11] Almost all

[11] Sanders, *Disqualification For Unemployment Insurance,* 8 Vand. L. Rev. 307 (1959); Burns, *Unemployment Compensation and Socio-Economic Objectives,* 55 Yale L.J. 1 (1949); Harrison, *Eligibility and Disqualifications for Benefits,* 55 Yale L.J. 117 (1945).

States have adopted disqualifications in their unemployment compensation programs similar to those in Maryland. That is probably the case because the present State acts are based on model legislation circulated by Federal officials at the time of the passage of the Federal legislation.[12] Certainly it is not unreasonable to decide not to pay AFDC-UF benefits because of conduct which most of the States reasonably have decided should disqualify a person for unemployment compensation.

2. The denial of benefits to persons participating in a labor dispute.

As pointed out in the Solicitor General's *amicus curiae* memorandum (S.G. 8-9), claimants here were not disqualified because of their participation in a labor dispute but rather because they were disqualified under Maryland law for the receipt of unemployment compensation. Therefore, the District Court had no occasion to reach the question of whether HEW had authority to allow States discretion to deny AFDC-UF benefits when the father was out of work due to his participation in a labor dispute.[13]

Nevertheless, a decision by this Court with regard to the portion of the HEW regulation concerning disqualifications from unemployment compensation is likely to address the validity of the other option given to the States concerning participation in labor disputes. The reasons supporting the denial of benefits to persons

[12] Larson and Murray, *The Development of Unemployment Insurance in the United States,* 8 Vand. L. Rev. 181 (1959).

[13] As the Solicitor General suggested, Maryland under its regulation does not deny AFDC-UF benefits merely because of participation in a labor dispute. The claimant must be disqualified from unemployment compensation. Therefore, the Maryland regulation at issue here does not apply to those persons who are not covered by the States unemployment insurance compensation program.

disqualified from unemployment compensation also apply with regard to the denial of benefits to strikers. Certainly such persons can be considered voluntarily unemployed. In fact, as the District Court conceded, they are not necessarily unemployed (Jt.A. 83a). By criticizing the HEW regulation only because of its lack of "national standards", the District Court appeared to uphold the agency's authority to exclude such persons from the category of "unemployed".[14]

Another reason supporting a regulation denying benefits to strikers is the fact that the program is not really planned to assist them. For example, Section 407 requires that in order to receive AFDC-UF benefits, an unemployed father must be registered with the State Public Employment Offices, must accept any reasonable offer of employment, and must be referred to the Secretary of Labor within 30 days for participation in a work incentive program, 42 U.S.C. 607 (Jt.A. 34a). It makes no sense to assign a striking employee to a training project designed to prepare him for employment in the regular economy when he is likely to resume work in his regular job as soon as the strike has ended. Nor does it make sense to refer him to another job only to have him leave his new employer, with all the consequent disruptions, when the strike is settled. Rather than assume that Congress contemplated such exercises in futility, it is reasonable to adopt a construction of "unemployment" which is both consistent with the purposes of the AFDC-UF statute and

[14] As noted by the Solicitor General in his *amicus curiae* memorandum, HEW published a notice of proposed rulemaking after the *Francis-II* decision which would again amend its regulation, 40 Fed. Reg. 33461 (Jt.A. 121a). The proposed amendment adopts the view of the decision given in the text by requiring all States in the program to deny AFDC-UF benefits to persons whose participation in a labor dispute could or does result in disqualifying them from unemployment compensation, *Ibid.* The Solicitor General states that HEW has determined to withhold further action on that proposed amendment for the present time. (S.G. 10, n.8).

general usage in labor relations matters, *viz.*, a striker is employed — not unemployed.

3. The grant of discretion to the States to choose whether to treat such persons as unemployed.

As shown above, the legislative history makes clear that the Congress contemplated that while HEW would prescribe standards designed to limit state determinations of who was unemployed, the States at the same time would be given discretion to vary somewhat the coverage of their programs in response to their different needs and policies. In light of the broad grant of rule-making power to HEW contained in Section 407 and the uniform Federal hours-worked test, the grant of discretion to the States in two very specific areas reasonably related to the purposes and operation of the statute is not unreasonable or beyond the scope of the statute. As in the regular AFDC program, the States pay 50% of the cost of administration of the program and a substantial portion of the benefits paid, 42 U.S.C. 603(a). Therefore, of necessity, Federal supervision of the program requires the accommodation of diverse interests and views. This Court has recognized that the AFDC statutes permit the States wide discretion in several important areas, *Dandridge v. Williams,* 397 U.S. 471, 473 (1970); *Jefferson v. Hackney,* 406 U.S. 535, 542 (1970); *New York State Dept. of Soc. Services v. Dublino,* 413 U.S. 405, 412-13 (1973).

Sensitivity to the legitimate scope of this discretion is particularly important in interpreting Section 407(a). Unlike the regular AFDC program, approximately one-half of the States have decided to enter the AFDC-UF program. According to HEW statistical reports, twenty-six states, District of Columbia and Guam operated the AFDC-UF program during May 1976.[15] The HEW

[15] United States Department of Health, Education, and Welfare, National Center For Social Statistics, *Public Assistance Statistics, May 1976,* Table 5, DHEW Publication No. (SRS) 77-03100, (October 1976).

reports show that within the last two years, three states, Connecticut, Kentucky and Montana have put the program into effect, and one state, Oklahoma, has discontinued it.[16] A significant number of these twenty-six states have adopted restrictions similar to those imposed by Maryland and permitted by the HEW regulation.[17] An interpretation that Section 407(a) requires an exclusive national definition denying States any discretion in the program, would obviously influence state decisions on whether to enter or discontinue the program. Narrow restrictions on state eligibility conditions, not required under the statute, could thwart the program's general purpose of extending benefits to the families of laid-off workers in those States which have not yet implemented the program. See *New York State Dept. of Soc. Services v. Dublino, supra* at 421.

III.

THE DECISIONS BELOW VIOLATE THE HOLDINGS OF THIS COURT INTERPRETING THE SOCIAL SECURITY ACT AND ESTABLISHING THE SCOPE OF AGENCY RULE-MAKING.

The analysis of Section 407(a) and 45 C.F.R. 233.100(a) contained in the decisions below can fairly be analogized to that used by Gertrude Stein in *Sacred Emily:* "A rose is a rose is a rose is a rose." In *Francis-I,* the District Court recognized that the statute had given HEW broad discretion with regard to the establishment of guidelines for State definitions of determinations of unemployment, 340 F. Supp. at 365, (Jt.A. 23a), but it also stated:

[16] *Ibid.,* and the same report for December 1974 (April 1975) and July 1975 (November 1975).

[17] The Solicitor General indicated in his *amicus curiae* memorandum that eight jurisdictions deny benefits when the father has been discharged for cause, and eight deny benefits to the families of some category of strikers (S.G. 10, n.7). He does not indicate which, if any, of these jurisdictions have a restriction based solely on the operation of unemployment compensation disqualifications, such as Maryland's.

> . . . a man out of work because he was discharged for cause by his employer *is unemployed.* There can be no two ways about that conclusion. 340 F. Supp. at 366. (Jt.A. 24a).

In *Francis-II* the District Court raised that simple assertion to the level of the governing principle for its interpretation of Section 407(a). The court noted that the statute related to the unemployment of a father and then reiterated that a father discharged for cause "*is* unemployed" 379 F. Supp. at 81 (Jt.A. 83a). The court went on to state that "until the Congress amends the statute no combination of Federal and State regulations may provide that a father who is unemployed is not unemployed." *Ibid.* In *Bethea,* the court relied upon the analysis contained in *Francis-II,* by quoting the above two passages and not adding any further rationale. The *per curiam* decision by the Court of Appeals adopted the two opinions of the District Court as its own, without adding any further analysis. As already indicated, nowhere in these decisions did courts below address the question of the scope of the rule-making authority granted HEW.

The *Francis-II* decision did concede that strikers did not necessarily fall within the meaning of the term "unemployed". The court held, however, that by granting the States discretion to bar persons from AFDC-UF benefits, because of such participation the amended regulation "established no regulations for the States to follow" and simply permitted each State to do as it chose. The Court construed the amendment to require HEW "to establish national standards within which the regulations of each of the States were to be channelized and confined", 379 F. Supp. at 82 (Jt.A. 85a). Since the court found that the amended regulation contained "no standards whatsoever," the regulation was held to be illegal and of no effect.

The District Court's analysis with regard to persons who have been fired for cause or have voluntarily quit is not actually based on the words of the statute. The "plain meaning test" is an established method of statutory construction, but obviously when using it a Court must consider *all* the words of a statute as well as the intent of Congress in passing the statute, *United States v. Campos Serrano,* 404 U.S. 293 (1971); *Lynch v. Overholser,* 369 U.S. 709 (1962). In applying the plain meaning test to find the effect of the word "unemployment" the District Court ignored the words "as determined in accordance with standards prescribed by the Secretary." That construction violates another elementary rule of statutory construction that statutes are to be given "such effect that no clause, sentence or word is rendered superfluous, void, contradictory, or insignificant." *Rockbridge v. Lincoln,* 449 F.2d 567, 571 (9th Cir. 1971) citing *Richards v. United States,* 369 U.S. 1, 11 (1962). As this Court noted as recently as last year:

> When 'interpreting a statute the court will not look merely to a particular clause in which the general words may be used but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policies of law, as indicated by its various provisions, and give to it such a construction as will carry into execution of the will of the legislature . . .' *Kokosczka v. Belford,* 417 U.S. 642, 650 (1974), citing *Brown v. Duchesne,* 60 U.S. 183, 194 (1857).

Although the *Francis-II* decision recognizes HEW's authority to prescribe standards with regard to strikers, it neither describes the type of standards contemplated by the court nor explains why the overall approach taken by HEW in the regulation does not constitute setting a standard. It is difficult to understand what the District Court believes HEW must do in order to satisfy the Congressional mandate. Does the District Court

mean, in effect, that the statute requires that HEW must either mandate payments to strikers or bar all States from making payments to such persons? HEW, in fact, has interpreted the decision in that way in its pending proposed amendment to the regulation (Jt.A. 121a).[18] Such a result is not required by the words of the statute and could hardly have been intended by the Congress. Surely it fails to establish a middle ground between too broad or too narrow State eligibility criteria.

The Congressional attitude toward barring or mandating AFDC-UF benefits to strikers, or to all the classes represented by claimants, can be analogized to the Congress's decision that a uniform policy on the payment of unemployment compensation to strikers was not necessary to the federal labor relations policies. It has been shown that the Congress refused to include a provision barring unemployment compensation to strikers as part of the major labor relations and unemployment compensation enactments, *Grinnell Corp. v. Hackett,* 475 F.2d 449, 454 (1973); *cert. denied,* 414 U.S. 858, (1973). Not only did the Congress not address that question in the National Labor Relations Act and Social Security Act when they were first adopted in 1935, *ibid.,* but it specifically rejected proposals to deny unemployment compensation to strikers when such proposals were made as part of amendments to the NLRA (H.R. 3020, 80th Cong., 1st Sess. Section 2(3) (1947)); Statement by Chairman Mills, 115 Cong. Rec. 34106 (Nov. 13, 1969). On the other hand, it is clear that when the Congress wanted to set federal standards in this area it knew how to do so, *e.g.,* 45 U.S.C. 354 (a-2) (iii); 7 U.S.C. 2014(c). Thus while the Congress was aware of different attitudes by the States as to payment of unemployment compensation to strikers it decided to permit the diversity to continue. A

[18] See n. 14, *supra.*

similar showing as to Congressional awareness of the issue is not available in connection with the more recent AFDC-UF program, but it is likely that such an awareness also existed in connection with the enactment and amendment of that program. Therefore, it is reasonable to interpret the statute as not deciding the question but rather as authorizing HEW to permit State diversity in this regard if that agency determined that diversity was consistent with the program.

The approach taken by the District Court in *Francis-II,* directly contradicts the principles established by this Court in several cases in recent years as to the proper test for the validity of State limitations on AFDC eligibility, *King v. Smith,* 392 U.S. 309 (1968); *Townsend v. Swank,* 404 U.S. 282 (1971); *Carleson v. Remillard,* 406 U.S. 598 (1972); *New York State Dept. of Soc. Services v. Dublino, supra; Burns v. Alcala,* 420 U.S. 575 (1975). As this Court stated in *Alcala,* the proper test is that: ". . . once the federal standard of eligibility is defined, a participating State may not deny aid to persons who come within it in the absence of a clear indication that Congress meant the coverage to be optional" 420 U.S. at 580. The courts must first determine that the statute was intended to authorize or permit the payment of benefits to the claimants. Once that has been determined, an inquiry as to the validity of the state limitation is in order. Instead of using that method, the District Court seems to have followed the rule expressly disapproved in *Alcala* that "persons who are arguably in the federal eligibility standard must be deemed eligible unless the [Social Security] Act or its legislative history clearly exhibits an intent to exclude them from coverage, in effect creating a presumption of coverage when the statute is ambiguous" *Ibid.*

Here the legislative history shows beyond dispute a Congressional aversion, if not an express command against, the payment of benefits to persons who become

unemployed as a result of their own conduct. Further, the legislative history and the statute itself involve an express grant of broad "legislative" rule-making authority first to the States and then to the Federal government as to which persons are to be considered as eligible under the statute. By prescribing its own definition of unemployment and ignoring the grant of rule-making authority to HEW, the District Court, in effect, followed the "presumption of coverage" approach rejected in *Alcala*. Using the test set forth in *Alcala*, the legislative history behind section 407(a) shows that the standards developed by HEW fulfill the Congress' intent as to the elimination of wide disparities between State programs and they grant State discretion in the one area in which the Congress did not favor the payment of benefits. Since claimants do not fall within the federal standard, except insofar as HEW permits States to include them, the State's exercise of the option permitted by HEW is clearly valid. See *Alcala v. Burns*, 410 F. Supp. 1024 (S.D. Iowa 1976).

The decisions below are also inconsistent with the recent decision by this Court concerning a related aspect of the AFDC-UF program, *Philbrook v. Glodgett*, 421 U.S. 707 (1975). That case involved the meaning of the word "receiving" in Section 407(b) (2) (C) (ii) which, as indicated provides that payments may be made only to a father who ". . . is not receiving Unemployment Compensation during the same week as assistance is granted." Vermont had construed that provision to allow it to deny payments to fathers who were "eligible" for unemployment compensation for the same week. The Court first stated that Vermont's construction of the statute was contrary to the actual words of the statute, but then went on to examine the legislative history of the provision. Since these documents, although somewhat ambiguous, did not really support the State's interpretation, the Court concluded that the

literal meaning of the statute was to be applied. Therefore, fathers eligible for, but not receiving, unemployment compensation, could receive AFDC-UF. Similar close attention in this case to all of the words of the statute, as well as the legislative history, leads to the conclusion that the HEW regulation is valid, and, therefore, the Maryland restriction on AFDC-UF payments is also valid.

The *Francis-II* decision clearly violates the principles discussed earlier governing the treatment of "legislative" rule-making, *supra* at 20-22. In the *Francis-II* decision the District Court erroneously substituted its own interpretation of the statute for that of the agency charged with the administration of the program, HEW, e.g. *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413 (1945); *Udall v. Tallman*, 380 U.S. 1, 16-18 (1965). That administrative decision was entitled to particular respect because it was a "legislative" rule which the Congress had expressly directed the agency to develop for the implementation of the statute, rather than an interpretative rule, adding an administrative gloss to a statutory term. See Davis, *Administrative Law Treatise*, Secs. 5.03 and 5.04, and cases cited therein (1958 and 1970 Supplement). The District Court must find that the HEW regulation was arbitrary, unreasonable or beyond the scope of the statute, before substituting its own views as to the meaning of the statute. Such finding was not made because in the *Francis-II* decision the court did not address the nature of HEW's rule-making authority and the proper scope of judicial review of such legislative rule-making. The decisions of this Court, cited earlier make clear that the scope of judicial review of a legislative-type rule is limited and that a court is not to substitute its judgment for the administrative agency's when the regulation is a reasonable exercise of the statutory authority, e.g. *American Tel. and Tel. Co. v. United States*, 299 U.S. 232, 236-7 (1936); *Citizens To*

Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971); *New York State Dept. of Soc. Services v. Dublino, supra* at 421. Since 45 C.F.R. 233.100(a), as amended, fulfills the intent and command of Section 407(a) that HEW prescribe reasonable Federal standards that eliminate the previous wide variations in the program among the States, the regulation is a valid rule under the statute.

CONCLUSION

For the foregoing reasons, Maryland requests that the decisions below be reversed and the District Court be directed to vacate the injunctions entered therein.

Respectfully submitted,

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